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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

*B. Krasner
Proc I*

FILE: B-186939

DATE: January 27, 1977

MATTER OF: International Finance and Economics

DIGEST:

1. When estimated level of effort in RFP is substantially higher than estimate used in evaluation and estimated level of effort actually accepted, failure to amend RFP to indicate reduction in requirement is violation of FPR § 1-3.805-1(d) (1964 ed., circ. 1). However, work has proceeded to point where recommendation for corrective action is not practical nor in Government's interest.
2. When RFP for study of foreign maritime aids indicates that award will be made to technically acceptable offeror with most advantageous technical/cost relationship, and award was made to low technical, low priced offeror on sole basis of cost, award was improper, since cost comparisons indicated that high technical, higher priced proposal offered lower cost per hour rate and price difference is attributable to failure of agency to ensure that all offers were based on same estimated level of effort.
3. Where RFP states that cost-plus-fixed-fee contract is contemplated but does not prohibit fixed-price contracts, offeror may propose inherently more advantageous firm, fixed-price offer, which should be compared after careful "should cost" analysis of cost-plus-fixed-fee proposal.
4. GAO no longer reviews protests against affirmative determinations of responsibility due largely to substantial discretion afforded contracting officers.
5. Protests after award that Maritime Administration (Marad) research procurements should be for high quality effort rather than be only acceptable work at lowest cost is untimely, since evaluation criteria in RFP provided that technical/cost consideration would be used and Bid Protest Procedures require that protests based upon improprieties apparent in solicitation be made prior to closing date of RFP.

6. Protest after award that RFP plagiarized unsolicited proposal and that procurement should have been sole-sourced is untimely, since under Bid Protest Procedures these aspects are required to be protested prior to RFP closing date.
7. Whether technical personnel on proposal evaluation panel are aware of ramifications of technical determinations is irrelevant, since while it is function of technical evaluators to evaluate technical acceptability of proposals, it is contracting officer who decides weight to be given technical opinions.
8. Award of contract to firm whose subcontractor allegedly is operating subsidiary of bank which is lender to entities in countries to be studied in review of foreign maritime aids provides no basis for objection, since neither RFP nor FPR contains prohibition against conflict of interest and statutes in U.S. Code are not directed against immediate kind of situation.

International Finance and Economics (IFE) contests the propriety of an award for a study of foreign maritime aids by the Department of Commerce (Commerce) to Temple, Barker and Sloane, Inc. (TBS); under request for proposals (RFP) 6-38070.

This procurement originates from a prior study of foreign maritime aids performed by IFE in 1973-74 for Marad. In January 1976, IFE met with Marad officials to discuss updating and expanding the earlier study. Thereafter, IFE submitted an unsolicited proposal to perform the study. Since Marad is a component of Commerce and Commerce conducts procurements for Marad, the matter was submitted to Commerce as a possible sole-source contract. This suggestion was rejected by Commerce and RFP 6-38070 was issued on April 26, 1976, with a closing date for receipt of initial proposals on May 17, 1976. IFE was informed on April 7 that the procurement would be on a competitive basis. Notice of the procurement was published in the Commerce Business Daily on April 16.

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The evaluation criteria in the RFP specified:

A. Technical and Cost

Criteria Weight

Criteria

0 - 25

1. General approach to achieve objectives and to accomplish scope of work.

0 - 45

2. Knowledge and skills/expertise as demonstrated in previous work in field of international merchant marine aid programs.

0 - 15

3. Experience in Maritime policy oriented research projects.

0 - 15

4. Knowledge of international economics and issues.

0 - 100

B. Award

Award will be made to that offeror (1) whose proposal is technically acceptable and (2) whose technical/cost relationship is the most advantageous to the Government; and who is considered to be responsive within the meaning of Federal Procurement Regulation 1-1.12. Cost will be a factor in the award decisions, although the award may not be necessarily made to that offeror submitting the lowest cost. Likewise award will not necessarily be for technical capabilities that would appear to exceed those needed for the successful performance of the work."

Four proposals were received timely. The initial evaluation ranked the proposals:

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|-----------------------------------|------|
| IFE | 86.6 |
| TBS | 72.3 |
| International Maritime Associates | 71.0 |
| J. J. McMullen Associates | 65.0 |

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The narrative accompanying its report indicated the evaluation panel's unanimous choice of IFE as the best offeror. TBS was considered to lack breadth in the policy area of international merchant marine aids and its proposal was deemed to:

"* * * concentrate in the analysis section of the study at the sacrifice of the more complex information development requirements. The research team is strong in quantitative skills/economic forecasting. This fact is emphasized in the proposal with too much significance, in our viewpoint, attached to the projection of economic conditions and the likely maritime policies of the six powers of concern. It was the concerted opinion that this special expertise would not be called for in the proposed research study, which is essentially a reporting and analysis of the data type effort. The TBS approach fails to fit the needs of Marad in this research effort."

As an overview, the evaluation panel stated that "[T]he only other contractor, in the judgment of the committee, that could offer a quality product was the joint effort of Temple, Barker & Sloan and Chase Econometrics Associates. It is the recommendation of the evaluation committee that negotiations proceed only with the two highest rated contractors * * *."

Based upon the foregoing, the contracting officer determined that only IFE and TBS were within the competitive range. Therefore, clarifications were requested and received from both offerors. The RFP contemplated a cost-plus-fixed-fee (cpff) award. TBS's initial proposal was \$92,986, on a cpff basis, while IFE submitted a firm, fixed-price (ffp) offer of \$133,681. As a result of discussions, IFE's revised proposal's technical rating was changed from 86.6 to 87.6. TBS's revised proposal was raised from 72.3 to 73.0. The price proposals remained unchanged. At this point, the contracting officer determined that IFE's price, within the level of effort estimated in the RFP, was so high that discussions could be meaningless. Since the contracting officer considered TBS's proposal technically acceptable at a reasonable price, supported by the man-days expended on the prior

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procurement which were substantially less than the RFP estimated level of effort, the contracting officer determined that only TBS remained in the competitive range. Thereafter, TBS submitted its best and final offer of \$85,839.

IFE raises the following issues:

- (1) IFE is better able to perform the work and possesses superior qualifications. Conversely, TBS does not have sufficient capabilities to perform the study;
- (2) the legislative history of Marad indicates that its funds are to be spent on superior quality products, rather than cheaper, acceptable products;
- (3) the RFP statement of work was plagiarized from IFE's unsolicited proposal, thereby denying IFE the advantages of its labors, which should have resulted in a sole-source contract to IFE;
- (4) the technical evaluators did not fully appreciate the significance of finding TBS acceptable because they were inexperienced;
- (5) the proposed TBS subcontractor has a conflict of interest, which should have rendered TBS ineligible for award;
- (6) Commerce did not properly consider the advantages of its ffp offer versus TBS's cpff offer;
- (7) IFE was not treated equally with TBS because the evaluation was based on an update of the previous study, when the RFP indicated a broader range of study requiring a greater level of effort; and
- (8) Commerce erroneously failed to hold discussions with IFE for price reductions associated with the reduced scope of work Commerce was willing to accept.

IFE's protest is basically that Commerce failed to communicate a change in requirements to IFE. This caused IFE to submit an ffp proposal substantially higher than TBS's cpff offer because Commerce accepted a lower level of effort from TBS than specified in the RFP. This, in turn, caused Commerce erroneously to exclude IFE from the

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competitive range on the basis that IFE's price would preclude meaningful discussions. In this vein, IFE alleges that its prices were competitive with TBS's on a staff-day basis, thus compounding Commerce's initial mistake.

Commerce maintains that its actions were reasonable and proper. Commerce states that the extreme price differential indicated that discussions would not reduce IFE's proposed price to a competitive point, citing 52 Comp. Gen. 198 (1972) for the proposition that it is proper to determine a proposal initially included in the competitive range outside the competitive range on the basis of further information or price considerations.

Commerce arrived at the decision to place IFE outside the competitive range, in part, by a comparison of its offered prices to the cost of the previous contract on a level of effort basis. That is, the contracting officer compared the level of effort of the previous study to the level proposed in the unsolicited proposal, as well as to the level of effort submitted for the instant procurement. Commerce states that the level of effort performed under the previous contract is a "good point of reference to estimate the level of effort for the competitive solicitation." The previous study required approximately 260 staff-days of effort. IFE offered approximately 340 staff-days for the unsolicited proposal and 375 staff-days for this procurement. Considering this increase of approximately 70 percent from the previous contract and the price differential of approximately 43 percent between IFE and TBS, Commerce concluded that it was proper to place IFE outside the competitive range. Also, Commerce cites Shapell Government Housing, Inc., and Goldrich and Kest, Inc., 55 Comp. Gen. 839 (1976), 76-1 CPD 161, as sanctioning award based on the lowest cost per quality point even though this did not represent the lowest absolute cost.

However, we believe that the Shapell case is distinguishable. There, award was made on the basis of initial proposals to a technically superior proposal at higher prices. Furthermore, the case citations contained in Shapell, at page 848, indicate that each case is to be decided on its own facts.

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We are initially concerned that the evaluation did not comport with the procedure stated in the RFP. While price is certainly a factor which must be considered in determining the competitive range, the evaluation criteria in the RFP did not list price as a consideration. The technical/cost relationship was listed as an award consideration, but the weight of cost was not indicated. In the present case, Commerce concedes that cost was an "overriding consideration." In Commerce's view, the emphasis on cost became permissible upon the determination that TBS's proposal was acceptable.

It is basic that in a negotiated procurement the RFP must inform offerors of the factors on which the award decision will be based and their relative importance. It follows that if during the course of the procurement the stated needs of the Government change substantially, that fact must be communicated to offerors. FPR § 1-3.805-1(d) (1964 ed., circ. 1).

In this case, the level of effort stated in the RFP was "* * * approximately 18-24 man-months * * *." Using 20 staff-days per staff-month and 8 staff-hours per staff-day, the estimate is 2,880 to 3,840 staff-hours or 360 to 480 staff-days. Initially, IFE proposed 2,730 to 3,102 staff-hours (341 to 387 staff-days), revised to 2,975 to 3,400 staff-hours (372 to 425 staff-days). TBS proposed to perform the task in 1,873 staff-hours of effort. Assuming 8 man-hours per staff-day, this is equivalent to approximately 234 staff-days. Although the agency report states that "the Government estimated approximately 330-440 man-days [2,640 to 3,520 staff-hours] to perform the work," the actual staff-day estimate based on the 18-24 staff-month estimate in the RFP as indicated above would have been 360-480 staff-days. However, notwithstanding that, Commerce used 260 staff-days of effort, as a "good point of reference" in evaluating TBS's 234 staff-day estimate.

In our opinion, the differences among the estimated level of effort stated in the RFP, the one actually used in the evaluation, and the level of effort accepted by Commerce are significant. The agency report itself indicates some inconsistency as to how the evaluation was accomplished. The inconsistency arises in the estimated level of effort for this procurement. As indicated above, the report

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indicates that 330 to 440 staff-days of effort were estimated as sufficient to perform the work. Two sentences thereafter, the report states that the level of effort for the prior contract (260 staff-days) was deemed to be a "good point of reference to estimate the level of effort for the competitive solicitation." Both of these levels of effort differ from the one in the RFP. Moreover, the level of effort ultimately accepted was significantly less than the one in the RFP.

Whether this reduced level of effort reflected Commerce's opinion that the study was merely an update of the prior contract is not germane to our present consideration. What is pertinent is what was communicated to the offerors. The record contains no indication that a level of effort well below the announced estimate was ever communicated to IFE. Moreover, the level of effort proposed by IFE was well within the Government 330-440 estimate and the estimate in the RFP. When Commerce decided that the lower level of effort was acceptable, it was incumbent upon it to clearly inform all offerors of that fact. University of New Orleans, B-184194, January 14, 1976, 76-1 CPD 22. We think it is apparent how the level of effort impacts upon the proposed prices. It is safe to assume that had a lower level of effort been indicated the proposed costs would have also been reduced.

Commerce's own computations to compare the two prices illustrate the impact of the disparity in the levels of effort on the competitive standing of IFE and TBS. A total cost per hour was determined by dividing the number of proposed hours into the total cost. Since it was not known whether IFE used a 7- or 8-hour day, computations were performed on an alternative basis. IFE's cost per hour ranged from \$39.30 to \$44.92, while TBS's was \$49.65. Using only labor, burden and profit, the cost per hour becomes \$35.63 to \$40.72 for IFE and \$41.21 for TBS. Thus, the figures before Commerce at the time indicated that had IFE been accorded an opportunity to compete with TBS on the same level of effort, IFE's price would at least have been in the competitive range, if not the lowest offer received.

Thus, we believe that when Commerce was aware that (1) the estimate in the RFP was higher than it actually felt necessary, and (2) the highest ranked proposal was also inordinately high priced, the RFP should have been amended to solicit proposals based on the reduced requirements.

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Further, we believe that the evaluation plan actually employed departed from the evaluation scheme in the RFP. The RFP indicates that award would be made to that acceptable technical proposal whose technical/cost relationship was considered most advantageous to the Government. Cost, it was said, was not necessarily controlling, nor was technical excellence. We do not consider this statement as an affirmative discharge of Commerce's responsibilities to delineate the evaluation criteria and their relative importance. AEL Service Corporation, 53 Comp. Gen. 801 (1974), 74-1 CPD 217. Offerors were left to speculate how much quality Commerce was willing to buy, or, conversely, how poor a product Commerce would accept. Offerors should know where to place their emphasis.

The evaluation, in this instance, elevated cost to an overriding consideration. As soon as the contracting officer determined TBS to be within the competitive range, the technical superiority of IFE was abandoned. Cost became the sole consideration. If that was Commerce's intention, it is not clear from the RFP.

It also appears, as alleged by IFE, that Commerce disregarded any advantages of the ffp proposal. In view of our discussion above concerning the level of effort and its impact on price, any discussion of the merits of an ffp offer and a cost-plus-fixed fee proposal is wholly theoretical. However, our Office has recognized the inherent advantage to the Government of a firm, fixed-price proposal. Moreover, upon a careful "should cost" review, the relative benefits of the two types of proposals are comparable. Marine Management Systems, Inc., B-185860, September 14, 1976, 76-2 CPD 241.

The record indicates that IFE's proposal was downgraded because it offered a fixed price. Commerce's analysis shows that the level of effort increased from the prior contract, through the unsolicited proposal, to the competitive proposal. Commerce expressed its objection to the ffp offer on the basis that it makes it " * * * impossible to guarantee how much effort will be delivered * * *."

We believe that Commerce misses the point. Initially, we note that 41 U.S.C. § 254(b) (1970) requires an affirmative finding that a cpff contract is likely to be less costly than any other method. This is recognition of the desirability for ffp contracting.

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Moreover, Commerce solicited proposals for a study of maritime aids. This is not a level of effort contract. The number of hours stated is only an estimate. Since the contract was awarded on a cpff basis, the ultimate contract price is also only an estimate and does not guarantee any specific level of effort. What the ffp offer guarantees is an acceptable product at a stated cost.

Our views with respect to the number of other issues raised by IFE follow.

The allegation challenging TBS's ability to perform, vis-a-vis IFE's ability, is a protest against the contracting officer's affirmative determination that TBS is a responsible contractor. Our Office has discontinued its practice of reviewing protests against affirmative responsibility determinations, due largely to the substantial discretion afforded contracting officers in this regard. UTL Corporation, B-185832, March 30, 1976, 76-1 CPD 209. Therefore, this contention will not be considered on the merits.

IFE also maintains that the "legislative record" with respect to Maxed research appropriations suggests congressional intent that such funds be reserved for high quality efforts, not for "barely acceptable work." However, the evaluation criteria in the RFP clearly put all offerors on notice that a technical/cost consideration would be used. In this vein, our Bid Protest Procedures (Procedures), 4 C.F.R. part 20 (1976 ed.) at section 20.2(b)(1), require that protests based upon improprieties apparent in the solicitation must be protested prior to the initial closing date for receipt of proposals to be timely. Since the RFP conveyed Commerce's concern with cost, IFE's protest lodged after receipt of proposals is untimely and not for consideration on the merits on this point.

IFE has indicated that the RFP plagiarized IFE's unsolicited proposal. This action is alleged to have deprived IFE of any competitive advantage to be derived from its own work. IFE also maintains that the contract should have been awarded on a sole-source basis to IFE. We believe these aspects of the protest are untimely for the same reasons discussed immediately above. Likewise, these issues will not be considered on their merits.

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As to whether the personnel on the technical evaluation panel were sufficiently familiar with procurement to appreciate the consequences of their determinations, we do not find this consideration relevant. It is the function of the technical evaluators to evaluate the technical acceptability of the proposals. However, the contracting officer decides the weight to be given the technical opinions. FPR § 1-3.801-2(b) (1964 ed., amend. 52).

Commerce maintains that the issue of whether it considered the advantages of IFE's ffp offer is untimely raised under section 20.2(b)(1) of our Procedures. We disagree. The RFP merely indicated that a cpff contract was "contemplated." This statement does not restrict the submission or acceptance of an ffp proposal. Since the protest was filed 5 days after IFE was notified of the basis of protest, it is timely. This issue is intertwined with numbers (7) and (8) raised by IFE and was considered with them.

IFE also raises the possibility of a conflict of interest by TES's subcontractor. Chase Econometrics Associates, Inc., is allegedly an operating subsidiary of the Chase Manhattan Bank, which is a lender to many of the shipbuilding and operating entities in the countries to be studied. There are no provisions in the RFP or FPR regarding this type of potential conflict of interest. There are conflict of interest statutes codified in the United States Code, but they are not directed towards this type of situation. See Exotech Systems, Inc., 54 Comp. Gen. 421 (1974), 74-2 CPD 281. Therefore, we are unable to conclude that award was improper on this basis, even assuming the allegation to be correct.

Although we have declined to consider a number of the points raised on the merits, we conclude that the award to TBS was improper for the reasons stated above. However, since Commerce permitted the work to proceed while the protest was pending, we now believe that it has proceeded to a point where corrective action is no longer practical nor in the Government's interest. In that connection, we note that it took approximately 2 months for a report to be submitted on the protest. However, by a separate letter of today, we

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are bringing the delay in reporting and the procurement deficiencies noted to the attention of the Secretary of Commerce to preclude future recurrences.

J. H. Katten
Deputy Comptroller General
of the United States